In the Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1448

SALVATORE C. PRESTA, JR. AND MICHAEL ROMANELLI,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners claim that the trial judge's inquiry before accepting their pleas was inadequate; that they were entitled to a withdrawal of their pleas upon motion made prior to sentencing; and that they were prejudiced by having been represented at the time of plea by a lawyer who also represented a co-defendant who thereafter elected to cooperate with federal authorities.

1. An indictment filed in March 1972 charged petitioners with obstructing commerce by robbery, use of a firearm in the commission of a felony, and possession of stolen property, in violation of 18 U.S.C. 1951, 924(c) and 659. At a hearing on May 30, 1972, peti-

tioners and co-defendant Enrico Presta, all represented by the same retained counsel, Thomas Maloney, withdrew their pleas of not guilty and entered guilty pleas. Before accepting the pleas, the district judge assured himself that the pleas were made voluntarily, with knowledge of the nature of the charge and the consequences of the plea.[1] Addressing petitioners personally, Judge McMillen ascertained that no promises or threats had been made and that they were aware that the plea constituted a waiver of a trial by jury and confrontation of witnesses (5/30 Tr. 6-7). Following this the court reviewed each of the counts. Each defendant admitted participating in the acts charged in count 1, involving the robbery of 9,800 pounds of fresh fish from a trailer in transit from Boston to Chicago (5/30 Tr. 7-8). With respect to count 2, they admitted that a hand gun had been used in the course of that robbery.[2] On count 3, charging possession of the fish stolen from the trailer as it was proceeding from Boston to various places in Chicago, Romanelli remarked that he was unaware that the trailer had been in interstate commerce. Government counsel stated that such knowledge was not an element of the offense, and that the prosecution had to show only that the shipment was of an interstate character and that the defendants knew it was stolen when they possessed it. The court remarked (5/30 Tr. 11-12):

> Well, I think that is probably a correct interpretation of Count III. Maybe I did not phrase it properly.

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[1]We are lodging with the Clerk of this Court the transcript of the May 30 hearing, cited herein as "5/30 Tr."

[2]Petitioner Romanelli stated that he actually held the gun, while the others were aware that he had it (5/30 Tr. 9-10).

> In any event, you were in possession of this shipment and you knew it had been stolen because you were the ones who stole it, is that correct?

Petitioners and Enrico each replied affirmatively.

Turning to the consequences of the plea, Judge McMillen asked government counsel to state the penalty for each offense. The prosecutor did so, but without indicating that the sentence imposed upon count 2 was required by statute to be served consecutively to any other sentence (5/30 Tr. 12). Petitioners stated that they understood they could receive the sentences indicated by the prosecutor and that, notwithstanding this possibility, they still wished to plead guilty. Accordingly, the court accepted the pleas of guilty and ordered a presentence investigation (5/30 Tr. 13).

2. On July 27, 1972, petitioners, represented by new counsel, filed a motion to vacate their guilty pleas (Pet. App. F). They alleged as the basis for this motion that they had just learned that co-defendant Enrico Presta would be a government informant in a related case involving petitioners; accordingly, in their view, a conflict existed involving the attorney who had previously represented them jointly. Moreover, petitioners claimed that the inquiry conducted pursuant to Rule 11, Fed. R. Crim P., at the time of plea was inadequate because Judge McMillen failed to pursue petitioner Romanelli's statement that he was unaware that the shipment admittedly stolen was in interstate commerce at the time.

On September 12, 1972, Judge McMillen conducted a hearing on the motion. At that time petitioners' new counsel stated that the motion was filed because "just prior to the filing of this motion" (9/12 Tr. 5) petitioner Salvatore Presta had learned that his brother, Enrico, was about to become an informant, and petitioners had no way of knowing whether Enrico had helped the government in the instant case as well. Counsel also pointed to Romanelli's statement regarding his ignorance of the fact that the stolen goods were in interstate commerce, and argued that, since knowledge was an element of count 3, the plea was improperly accepted because petitioners had not admitted all of the elements of the offenses charged. Government counsel told the court that there had been no communications with Enrico until after the July 27 motion to vacate had been filed. Mr. Maloney, petitioners' former counsel (who continued to represent Enrico), explained that petitioners and Enrico had pursued a consistent position until July 24, when Enrico told Salvatore Presta that he intended to cooperate with the government. Three days later, Enrico met with a government agent for the first time (9/12 Tr. 10-12).

The court ruled that knowledge that the goods stolen were in interstate commerce was not an element of any of the offenses with which petitioners were charged and that there had been no defects in its inquiry pursuant to Rule 11. In addition, the court rejected the claims based upon counsel's alleged conflict of interest. The motion to withdraw premised upon Rule 32(d), Fed. R. Crim. P.[3], was denied. At a

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[3]Rule 32(d) provides:

> A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

sentencing hearing on October 17, 1972, the court examined the factual basis further, ascertaining that Salvatore Presta was the leader of the group that had hijacked the trailer and that Romanelli, wielding a gun, also had taken $300 from the truck driver and threatened him, so frightening the driver that he thereafter hired a private investigator to protect him and his family (10/17 Tr. 8-10). The court imposed concurrent terms of imprisonment for four years on Salvatore Presta and five years on Romanelli.

3. A few days later another hearing was conducted, because the court had learned that a sentence for conviction of violating 18 U.S.C. 924(c) (count 2) was required by the terms of that statute to be served consecutively to any other sentence. To avoid any problems possibly flowing from the court's failure to advise petitioners of the mandatory consecutive nature of such a sentence when conducting the Rule 11 inquiry, government counsel moved to vacate the sentence imposed on count 2 and dismiss that charge. The court granted the motion (10/27 Tr. 5).[4]

4. Petitioners renew their contentions, rejected below, that the plea-taking inquiry conducted by Judge McMillen failed to comport with Rule 11.[5]

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[4]Partly as a result of the cooperation of Enrico Presta, petitioners and Enrico were charged with other hijackings. They each entered pleas of guilty, and petitioners were sentenced to additional terms of imprisonment to be served consecutively to the sentence imposed by Judge McMillen.

[5]Rule 11 provides, in pertinent part:

> * * * The court may refuse to accept a plea of guilty, and shall not accept such plea * * * without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. * * * The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is factual basis for the plea.

a. Judge McMillen addressed petitioners personally and at length at the time he accepted the plea. The court was not compelled ritualistically to read the statutory provisions personally, but could enlist the assistance of government counsel in making known the maximum sentence. See *United States* v. *Mileto,* 434 F. 2d 251 (C.A. 2); *McCarthy* v. *United States,* 394 U.S. 459, 467, n. 20. Insofar as the court may have been required to ascertain that petitioners were aware that any sentence imposed on count 2 was to be served consecutively to the sentence on counts 1 and 3 [cf. *Sexton* v. *United States,* 446 F. 2d 862 (C.A. 5)] any issue thereby created was mooted by the vacation of sentence and dismissal of count 2.

b. Petitioners' claim that the court did not assure itself that they were aware of the nature of the offense is bottomed upon Romanelli's statement regarding his lack of awareness that the goods stolen were moving in interstate commerce. Petitioners are mistaken in their belief that such knowledge constitutes an element of the offenses charged. See *United States* v. *Nakaladski,* 481 F. 2d 289, 299 (C.A. 5), certiorari denied, 414 U.S. 1064; *United States* v. *Allegretti,* 340 F. 2d 243 (C.A. 7), certiorari denied, 381 U.S. 911. Unlike the situation in *McCarthy, supra,* where, in the colloquy between the court and the defendant, who was charged with willful evasion of taxes, the defendant stated that his failure to pay was not deliberate, nothing in the dialogue between the court and petitioners in this case raised any doubt that petitioners had committed all of the acts constituting the offenses charged.

5. Petitioners assert that, even if the guilty plea inquiry contained no fatal defects, they had the unfettered right, pursuant to Rule 32, to withdraw the

plea at any time before sentence, and that, even if that were not so, the court's refusal to permit a pre-sentence withdrawal violated the general principle that such withdrawals should be freely allowed. However, Rule 32 confers no absolute right to withdraw a guilty plea before sentencing. *Dorton* v. *United States,* 447 F. 2d 401 (C.A. 10); *United States* v. *Rawlins,* 440 F. 2d 1043 (C.A. 8); *United States* v. *Ptomey,* 336 F. 2d 759 (C.A. 3). The courts are in accord that a motion to withdraw a plea of guilty, even when made before sentencing, is addressed to the sound discretion of the court; that although such motions should be freely allowed, the defendant must furnish a plausible reason for withdrawal; and that the desire to have a trial is not in itself a sufficient ground for withdrawal. *United States* v. *Vallejo,* 476 F. 2d 667 (C.A. 3), certiorari denied *sub nom. Miller* v. *United States,* 414 U.S. 830; *United States* v. *Vasquez-Velasco,* 471 F. 2d 294 (C.A. 9), certiorari denied, 411 U.S. 970; *United States* v. *Sambro,* 454 F. 2d 918 (C.A. D.C.); *Dorton* v. *United States, supra; United States* v. *Rawlins, supra; United States* v. *Ptomey, supra; United States* v. *Ford,* 363 F. 2d 375 (C.A. 4).

In petitioners' case, the district judge, examining the reasons put forth for withdrawal, properly determined that fairness and justice did not require undoing the acceptance of their guilty pleas. See *Kercheval* v. *United States,* 274 U.S. 220, 224. Petitioners never charged prior counsel with misadvising them, did not deny the truth or voluntariness of any admissions of guilt made at the Rule 11 inquiry, and did not assert that they had a

specific defense to the charges.[6] The court expressed its satisfaction that there were no errors in the plea-taking procedures, when petitioners had entered pleas of guilty "because they were guilty" (9/12 Tr. 17). Accordingly, the denial of the motion for a withdrawal of the guilty plea was well within the court's discretion.

6. Petitioners' claim of denial of their Sixth Amendment right to counsel is bottomed upon the decision by Enrico Presta, made after their guilty pleas had been entered, to begin cooperating with the government. The record clearly shows that petitioners, Enrico, and the attorney whom they jointly shared pursued parallel courses until Enrico's change of heart. At that point, petitioners retained new counsel and Mr. Maloney continued to represent Enrico. The cooperation of Enrico evidently enabled the government to file additional charges against petitioners (as well as

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[6]Petitioners' claim that the district judge improperly stressed their guilt in denying their motion to withdraw must be examined in context. At the September 12 hearing, newly retained defense counsel appeared to urge that petitioners had an absolute right to withdraw their plea at that juncture. Failing this, counsel argued that petitioners had a defense, *i.e.*, the lack of knowledge regarding the interstate character of the hijacked trailer and its contents. Even if this factual defense were inadequate, defense counsel alleged that petitioners had another defense, which he refused to describe in any manner. The court then made the statement (Pet. 18) that if at this "11th hour" counsel could not set forth the defenses specifically, the claim of availability of such defenses would not be given much weight. Clearly, Judge McMillen did not compel petitioners to assert their innocence or completely refute their prior admissions as a prerequisite to granting the motion for withdrawal.

Enrico), and petitioners pleaded guilty to the supplementary charges. There is no basis whatsoever for petitioners' suggestion (Pet. 30) that Mr. Maloney might have violated their confidences by revealing information received while all three defendants were jointly represented by him. To the extent that Enrico Presta, himself, might have made disclosures harmful to petitioners, that has no bearing upon their right to counsel. Certainly prior joint representation by one attorney does not bar the government from taking advantage of the willingness of one of three defendants to begin revealing information adverse to the interests of the other two. Their pleas of guilty to the subsequent charges may well have been triggered by petitioners' awareness of the strength of the government's case in light of Enrico's revelations, but that fact does not amount to a showing that petitioners' Sixth Amendment rights were violated in this case.[7]

ROBERT H. BORK,
Solicitor General.

JUNE 1974.

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[7]The claim could in any event have no bearing on the correctness of the decision in the instant case, where the guilty pleas were entered prior to the events forming the basis of petitioners' contentions. Their complaint, if any, would have to be addressed to the subsequent charges and convictions, although it would appear that they waived any such defense by their pleas of guilty to those charges.